

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALTON D. BROWN,)	
)	Civil Action No. 08 - 26
Plaintiff,)	
)	
v.)	
)	District Judge Joy Flowers Conti
JEFFREY A BEARD; WILLIAM)	
STICKMAN; LOUIS S. FOLINO; DAN)	
DAVIS; HARRY S. WILSON; GREGORY J.)	
SIMATIC; LIEUTENANT KIRBY;)	
LIEUTENANT FRANK; SERGEANT)	
MICHNIK; OFFICER BIAGINI; OFFICER)	
ROHRER; OFFICER BASINGER;)	
SERGEANT GAGNON; OFFICER SANTI;)	
R. WORKMAN; MARY S. REESE; NURSE)	
GRESS; S. IREY; R. TRETINIK MICHAEL)	
HERBIK; PRISON HEALTH SERVICES,)	
INC.; GARY LANCASTER, <i>U.S. District</i>)	
<i>Judge</i> ; ROBERT C. MITCHELL, <i>U.S.</i>)	
<i>Magistrate Judge</i> ,)	
)	
Defendants.		

MEMORANDUM ORDER

The above captioned case was initiated by the filing of a motion to proceed in forma pauperis (Doc. No. 1) on January 7, 2008, and was referred to a United States Magistrate Judge for pretrial proceedings in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrate Judges.

The magistrate judge's report and recommendation (Doc. No. 84), filed on February 1, 2010, recommended that the motions to dismiss plaintiff's second amended complaint filed by defendant Gregory Sematic (Doc. No. 67) and defendants Prison Health Services, Inc., Michael Herbiak, M.D. and Debra Gress, N.P. (Doc. No. 79) be granted and that the court order granting

plaintiff's motion to proceed in forma pauperis (Doc. No. 2) be vacated, that plaintiff's motion to proceed in forma pauperis be denied in accordance with 28 U.S.C. § 1915(g) and that the action be dismissed for plaintiff's failure to pay the filing fee, with the right of plaintiff to reopen by paying the full \$350.00 filing fee within sixty (60) days.

Plaintiff filed objections to the report and recommendation on February 17, 2010 (Doc. No. 85). In these objections, he claims that the report and recommendation violates an agreement by the parties whereby he agreed to dismiss the claims against defendants Robert C. Mitchell, Gary Lancaster, Tom Corbett, Rodney M. Torbic, Scott A. Bradley and Leslie Anne Miller and, in return, plaintiff's IFP would not be revoked. This assertion is patently belied by the record. In the court order dated August 27, 2009, the court clearly stated as follows.

The following was agreed to by plaintiff at this status conference: He voluntarily withdrew his claims against Gary Lancaster, Robert Mitchell, Tom Corbett, Rodney Torbic, Scott Bradley and Leslie Ann Miller. Based upon this agreement to withdraw, the court will let stand plaintiff's second amended complaint filed on July 14, 2009 at document number 62. Also based upon this agreement to withdraw, counsel for the Department of Corrections will agree to accept service for the following defendants: Brian Coleman, Adam Crumb, Eric Johnson, Officer Zebrowski, Officer Miller, Officer Lawrence, Officer Newhouse and Cindy Watson. Attorney Pasarelli advised that defendant Mary Reese is deceased and no estate has been raised. She will advise the court whether or not she is able to enter an appearance on behalf of this defendant. Pursuant to court order which will follow this summary, and also pursuant to agreement of counsel, the motion to dismiss at document number 63 and the motion to strike at document number 66 will be denied as moot. The motion to dismiss at document number 67 will remain pending and the court will rule on this motion. An answer to the Second Amended Complaint is to be filed by September 28, 2009. Finally, counsel for the Department of Corrections is granted leave to renew its motion to revoke plaintiff's in forma pauperis status should they desire to do so.

(Doc. No. 75, emphasis added.) Moreover, contrary to plaintiff's assertion, he does not allege any facts sufficient to satisfy the "imminent danger" exception to the three strikes rule.

After *de novo* review of the pleadings and the documents in the case, together with the report and recommendation, and the objections thereto, the following order is entered:

AND NOW, this 5th day of March 2010;

IT IS HEREBY ORDERED that the motion to dismiss plaintiff's second amended complaint filed by defendant Gregory Sematic (Doc. No. 67) is **GRANTED** and that the motion to dismiss plaintiff's second amended complaint filed by and defendants Prison Health Services, Inc., Michael Herbik, M.D. and Debra Gress, N.P. (Doc. No. 79) is **GRANTED**.

IT IS FURTHER ORDERED that the order granting plaintiff's motion to proceed in forma pauperis (Doc. No. 2) is **VACATED**.

IT IS FURTHER ORDERED that plaintiff's motion to proceed in forma pauperis is **DENIED** in accordance with 28 U.S.C. § 1915(g).

IT IS FURTHER ORDERED that this action is **DISMISSED** for plaintiff's failure to pay the filing fee, with the right of plaintiff to reopen by paying the full \$350.00 filing fee within sixty (60) days. The clerk of court is directed to mark this case closed.

IT IS FURTHER ORDERED that the report and recommendation of the magistrate judge dated February 1, 2010 (Doc. No. 84) is adopted as the opinion of the court.

/s/ Joy Flowers Conti
Joy Flowers Conti
United States District Judge

cc: Alton D. Brown, DL-4686
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